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NO. 89-1158

Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1989

MERCEDEL W. MILES, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE SUCCESSION
OF LUDWICK ADAM TORREGANO

Petitioner

VERSUS

APEX MARINE CORPORATION, WESTCHESTER
MARINE SHIPPING COMPANY, INC.,
ARCHON MARINE COMPANY
AND AERON MARINE COMPANY

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS
IN OPPOSITION TO THE PETITION

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LIST OF PARTIES

The parties involved in this matter include those set forth in the caption. The original action brought by Mercedel W. Miles also was brought on behalf of Joseph Torregano, the decedent's father.

SUMMARY OF THE ARGUMENT

Although petitioner claims the decedent's "estate" should be entitled to recover the future economic loss of the decedent under a maritime survival action, the general maritime law does not recognize the "estate" as a beneficiary entitled to recover such damages. Thus, the claim of petitioner, who attempted to recover indirectly what she was not entitled to recover directly, properly was denied as there was no basis for recognizing the "estate" as a beneficiary under maritime law. In addition, the "future economic loss" of the decedent is not a recoverable item of damages under the general maritime law survival action or under statutory survival action provisions. Recovery in survival actions is limited to the decedent's pre-death damages. Uniformity of the maritime law is best served by rejecting petitioner's claim for items of damages which have not been provided for by statute or recognized by the vast majority of admiralty courts. As the decision of the court below in denying this element of damages is consistent with the precedents of this Court and the decisions of other admiralty courts, the Fifth Circuit's ruling on this issue does not warrant further review.

Petitioner, the nondependent parent of the deceased, also claims she and the nondependent father of the deceased are entitled to recover loss of society damages. However, the thrust of the maritime law and related statutory provisions have been to protect the *dependents* of deceased seamen. Accordingly, this Court has strongly indicated, and the lower courts have held, that only dependents may recover loss of society damages. Policy reasons as well dictate denial of such damages to non-dependents. To hold otherwise could allow any non-dependent relative of a decedent to recover loss of society damages resulting in needless uncertainty as to potential claimants and protracted litigation. The decision of the court below properly denied this element of damages and does not require review by this Court.

ARGUMENT

A. "Estate" Not Entitled to Recover Future Economic Loss

Petitioner's claim for the income which the decedent purportedly would have realized but for his death involves two issues: (1) whether the "estate" is a beneficiary under the general maritime law entitled to recover damages, and (2) whether lost future earnings

are a recoverable item of damages under the maritime survival action.

Petitioner cites only *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987) as authority for such claim. The *Evich* panel's determination that the estate is entitled to recover the decedent's lost future earnings represents a departure from established maritime law. Although the *Evich* court stated that "the recoverability of future economic loss in a post-Moragne [*v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 712, 26 L.Ed.2d 339 (1970)] survival action has not been addressed by a circuit court[.]" *Evich*, at 258, the Sixth Circuit had addressed a closely related issue in the context of a wrongful death action in *Complaint of Cambria Steamship Co.*, 505 F.2d 517 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975). In *Cambria*, the decedent had no dependent relatives; accordingly, the claim for loss of future earnings was asserted on behalf of the decedent's estate. In affirming the district court's determination that the estate was not entitled to such recovery, the Sixth Circuit stated:

In our view, the liberal and humanitarian character of maritime proceedings as expressed in *Moragne* and *Gaudet*, *supra*, contemplates solicitude for dependents, not inanimate estates.

Similarly, in discussing the same issue, the court in *Fajardo v. Maersk Line Agency*, 1989 A.M.C. 1923 (D.Md. 1988), rejected the claim of the parents of a deceased child for loss of future earnings under the general maritime law. The court specifically rejected the rationale in *Evich v. Morris*, stating:

Contrary to the abundance of state law and the guidelines of the relevant federal statute, and ignoring the Sixth Circuit's holding in *Cambria*, the [*Evich*] court awarded loss of future earnings to decedent's estate. This Court will not adopt the Ninth Circuit's opinion, but will adhere to the majority of state decisions, the Jones Act, and the Sixth Circuit in denying the decedent's estate compensation for loss of future earnings.

Fajardo, 1989 A.M.C. at 1927.

Only specified classes of beneficiaries are entitled to recover damages for wrongful death and survival actions under the Jones Act, 46 U.S.C. §688, incorporating the Federal Employers' Liability Act, 45 U.S.C. §51 (surviving spouse and children; if none, then parents; if none, then dependent next of kin), the Death on the High Seas Act, 46 U.S.C. §761 (spouse, parents, child, or dependent relative), and the general maritime law (spouse, parents, children and dependent relatives -- see, e.g., *Complaint of Patton-Tully Transp.*

Co., 797 F.2d 206, 212-13 (5th Cir. 1986), *reh'g. denied*, 800 F.2d 262 (5th Cir. 1986)). Neither the federal statutes permitting recovery for wrongful death and survival actions on the high seas or territorial waters nor the general maritime law include the "estate" as a beneficiary. Respondents respectfully suggest that one panel of the Ninth Circuit simply ignored the established classes of beneficiaries entitled to recover damages in wrongful death and survival actions.

Even if the "estate" were a beneficiary under the general maritime law, loss of future earnings of the deceased is not a recoverable item of damages in a maritime survival action. The *Evich* panel acknowledged that the majority of states do not allow future economic loss to be recovered in survival actions and that the Jones Act provides for no such recovery. *Evich*, at 258. That panel further acknowledged that "[m]ost states and the Jones Act allow these damages [for future economic loss] to be recovered in the form of loss of support when wrongful death beneficiaries exist." *Evich, id.* In the case at bar, petitioner, in fact, recovered damages for loss of support. Thus, even assuming the "estate" were entitled to recover for future economic loss, there is an obvious risk of double recovery as the future lost earnings of the decedent form the fund from which the wrongful death proceeds,